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No. 03-1431

Supreme Court, U.S.
FILED
JUN 17 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

HOSPITALITY MANAGEMENT ASSOCIATES, Inc., *et al.*,

Petitioners,

v.

SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, HOECHST CELANESE CORPORATION, and E.I. DuPONT de NEMOURS AND COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

SHELL OIL COMPANY'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the South Carolina Supreme Court properly affirmed the granting of full faith and credit to the final judgments of the Tennessee and Alabama state courts in, respectively, *Cox v. Shell Oil Co.*, Case No. 18,844, Chancery Court, Obion County, Tennessee ("*Cox*"); *Spencer v. Shell Oil Co.*, Case No. CV-94-047, Circuit Court. Greene County, Alabama ("*Spencer*").

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners have identified all parties in this proceeding.

Pursuant to Supreme Court Rule 29.6, Respondent Shell Oil Company advises the Court that Shell Oil Company is a wholly-owned subsidiary of Shell Petroleum, Inc., a Delaware corporation. Shell Petroleum, Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by The "Shell" Transport and Trading Company, p.l.c.

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EXPLANATION OF RECORD CITES

"Pet." refers to the Petition for Writ of Certiorari.

"Pet. App. ___" refers to the Appendix attached to the Petition for Writ of Certiorari.

"Shell App. ___" refers to the Appendix attached to Respondent Shell Oil Company's Brief in Opposition to Writ of Certiorari.

"R. ___" refers to the Record on Appeal filed with the South Carolina Supreme Court cited by specific page number.

SHELL OIL COMPANY'S BRIEF IN OPPOSITION

This case involves a collateral attack on the 1995 final judgments of Tennessee (*Cox*) and Alabama (*Spencer*) approving two nationwide class action settlements.[1] No exceptional circumstances are present here. Petitioners are members of the *Cox* and *Spencer* settlement classes who did not opt out. They could have obtained the substantial relief offered by the *Cox* and *Spencer* settlements. Instead, they sued Respondents Shell Oil Company ("Shell"), Hoechst Celanese Corporation ("Celanese"), and E.I. DuPont de Nemours & Co. ("DuPont") in the hope they would obtain greater relief through litigation. The South Carolina Supreme Court affirmed a summary judgment in favor of Respondents. The issue Petitioners' case raises is the full faith and credit the United States Constitution guarantees to the final judgments of the sister states.

Petitioners seek to avoid the preclusive effect of the *Cox* and *Spencer* settlements by claiming that the notices provided to absent class members in 1995 were inadequate and the classes were inadequately represented. All of Petitioners' objections about the manner of giving notice, the content of the notice, and the conduct of class counsel could have been presented to the *Cox* and *Spencer* courts in 1995. In fact, many of Petitioners' specific complaints mimic objections that were actually made in the *Cox* proceeding and ruled on by the *Cox* court. No theory of collateral review would allow Petitioners to relitigate these objections.

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[1] Final Judgment in *Cox v. Shell Oil Co.*, Case No. 18,844 (Chancery Ct., Obion Cty., Tenn. Nov. 17, 1995) (Shell App. 40-44) and Final Order Approving the Class Action Settlement, Attorneys' Fees and Expenses, and Awards to Representative Plaintiffs in *Cox* (filed Nov. 17, 1995) (Shell App. 11-39) (collectively "*Cox*"); *Spencer v. Shell Oil Co.*, Case No. CV-94-047 (Circuit Ct., Greene Cty., Ala. Nov. 17, 1995) (R. 4385-4390) ("*Spencer*").

The decision of the South Carolina Supreme Court represents an unexceptional application of traditional full faith and credit principles. Mindful of this Court's admonition that class action judgments are subject to the same full faith and credit analysis as other judgments, the South Carolina Supreme Court carefully reviewed the settlement approval procedures employed by the Tennessee and Alabama courts and determined that those courts had scrupulously ensured that absent class members were accorded the due process this Court requires. As a result, the South Carolina Supreme Court held, the *Cox* and *Spencer* judgments were entitled to full faith and credit in the courts of South Carolina. South Carolina is not the first, but simply the most recent, state that has granted full faith and credit to the *Cox* and *Spencer* final judgments.[2]

Petitioners ask this Court to rule that they were entitled to litigate in the South Carolina courts their objections to the adequacy of notice and the adequacy of representation as if they were making them for the first time to the *Cox* and *Spencer* courts. (Pet. 14, 29-30). Notably, however, Petitioners cannot – and do not – cite any authority for such an extreme proposition. If Petitioners' theory prevailed, it would be virtually impossible for defendants ever to compromise class action litigation. Every class settlement would be subject to endless relitigation as absent class members paraded one by one through every court in this country demanding *de novo* review of every class judgment. Fortunately, that is not the law. To the contrary, where the state court approving a class action settlement has squarely addressed the due process issues, absent class members are not entitled subsequently to relitigate those issues. Labeling those issues "jurisdictional" does not expand the permissible

[2] *E.g.*, the Tennessee court's judgment in *Cox* has also been given full faith and credit by courts in Alabama, Arizona, Florida, and Wisconsin. (R. 3583; R. 3571-3574; R. 3944-3946; R. 3947-3955).

scope of review because, as this Court has held, full faith and credit principles apply equally to questions of jurisdiction. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982).

Because the South Carolina Supreme Court conscientiously applied to the *Cox* and *Spencer* judgments the principles of full faith and credit previously announced by this Court, Petitioners' application for writ or certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background

Petitioners are all members of the 1995 *Cox* and *Spencer* nationwide settlement classes who did not opt out. Instead, they sought damages from Shell, Celanese, and DuPont for allegedly defective polybutylene ("PB") plumbing systems installed in structures they own.[3]

PB plumbing systems are comprised of PB pipe and various "fittings" that join sections of the pipe. These fittings are made from different raw materials and different designs. Respondents did not manufacture or sell the PB plumbing systems or the component parts of those systems. Rather, Shell manufactured the PB resin that was sold to third parties who extruded it into PB plumbing pipes, and Celanese and DuPont manufactured and sold acetal resins named Celcon and Delrin, respectively, which were molded into the plastic fittings used to join the pipes together.

By 1995, litigation over PB plumbing systems had been pending in many courts around the country for

[3] Because Petitioners' Statement of Facts is simply a self-serving recitation of their allegations, replete with misstatements and mischaracterizations of fact and law, Shell respectfully presents its own Statement of Facts.

almost a decade. (Shell App. 18, ¶ 1). In November 1994, the *Spencer* lawsuit – a putative nationwide class action – was filed in Alabama state court against Shell, Celanese, and DuPont. At that time Respondents were actively negotiating the settlement of another nationwide class action previously filed in Texas state court ("*Beeman*"). (Shell App. 18, ¶¶ 2-3). Although the parties reached a settlement in *Beeman*, it ultimately fell through when the Texas court denied preliminary approval in February 1995. (Shell App. 18, ¶ 3). In May 1995, DuPont reached a settlement in *Spencer*, and the Alabama court preliminarily approved it. (R. 4155-4169).

In June 1995, the *Cox* action was filed against Shell and Celanese in Tennessee.[4] (R. 4040-4059). After the *Cox* court certified a national class,[5] *Beeman* class counsel joined with *Cox* class counsel to prosecute the *Cox* action on behalf of owners of structures containing PB plumbing systems. (Shell App. 19, ¶ 4; R. 2377-2379). Meanwhile the *Spencer* court certified a class action against the non-settling defendants Shell and Celanese. At that point Shell and Celanese faced two competing nationwide class actions.

On July 31, 1995, Shell and Celanese reached a settlement with the *Cox* plaintiffs. (Shell App. 20, ¶ 10). On August 9, 1995, the *Cox* court heard arguments from the objectors to the settlement, including *Spencer* class counsel, on the adequacy of the proposed notice, the applicable due process requirements, and the adequacy of class representation. (R. 3725-3743; R. 3746-3754). On August 30, 1995, the *Cox* court heard further arguments

[4] There is no truth to Petitioners' assertion that Respondents Shell and Celanese had anything to do with the filing of the *Cox* case. (Pet. 4-5).

[5] It is similarly false that Respondents acquiesced in the Tennessee class certification. (Pet. 5 n.1). In fact, the *Cox* court itself noted that Shell and Celanese contested certification and ultimately agreed to it for settlement purposes only. (Shell App. 28, ¶ 35).

and evidence in favor of, and objections to, the notice program. (R. 2922-3050). Then, on September 22, 1995, the *Cox* court gave final approval to the forms of notice, scheduled a fairness hearing, and set opt-out and objection dates. (R. 3092-3096).

The original *Cox* settlement required Shell and Celanese to provide $850 million to pay for replumbs[6] for those claimants who had a qualifying plumbing leak and for the repair of physical damage to property resulting from a leak. (Shell App. 30, ¶¶ 45, 46). The settlement created a centralized facility, the Consumer Plumbing Recovery Center (CPRC), to administer the replumb program, which was to run until 2009. (Shell App. 21, ¶ 12(e); R. 4467, §§ 1.1-1.3). The *Cox* class included not only past and present owners of structures with PB plumbing, but also future owners. (Shell App. 36). The settlement provided for notice to be given to class members every three years and for the right of subsequent purchasers of structures with PB plumbing to opt out following receipt of these notices. (Shell App. 21, ¶ 12(e); R. 2288-2290, § 9). If at any time there were insufficient funds to pay valid claims, Shell and Celanese had the option to contribute additional funds to pay those claims. If they did not elect to do so, those class members whose claims were not paid were not barred, and they remained free to sue Shell and Celanese with all applicable statutes of limitations and/or repose tolled. (R. 2246, ¶ 12(c); R. 2280-2281, §§ 4.5.2, 4.5.3; R. 2300, § 22.2).

In October/November 1995, class counsel for both *Cox* and *Spencer*, class counsel for other putative classes, and Respondents participated in two weeks of lengthy and intense negotiations under the supervision of Judge Richard M. Silver of the California Superior Court, who was presiding over yet another putative class action

[6] A "replumb" is the replacement of a class member's leaking PB plumbing system with a new copper or CPVC plumbing system.

brought against Respondents. (Shell App. 19-20, ¶¶ 7-9). Ultimately, the parties agreed upon a joint national settlement. The global settlement enhanced in several respects the benefits available to class members under the original *Cox* settlement – Shell and Celanese agreed to increase the settlement fund to $950 million; interest on the funds would be deposited for the benefit of class members (and not credited toward the settlement amount); and the window within which a leak would entitle a claimant to a replumb without regard to the age of his plumbing system was increased from one year to two years. (R. 2516-2518; R. 2572-2577; R. 2646-2655). Judge Silver issued a report on the settlement negotiations, in which he recommended that the settlement be approved and that all courts concerned afford it full faith and credit. (Shell App. 1-10).

On November 17, 1995, the *Cox* court entered a final order approving the class action settlement with Shell and Celanese, which included $45 million for class counsel and $3,000 for the class representatives. (Shell App. 38, ¶ 12). The funds for notice and attorneys' fees were in addition to the $950 million in settlement funds, *i.e.*, the entire settlement fund was reserved for class relief. (Shell App. 21, ¶ 12(f); R. 4468, § 2.1). In addition, the settlement provided that the CPRC would be governed by an eight-member board of directors, equally representing the plaintiffs and Shell and Celanese, subject to removal and supervision by the court. (R. 2518; R. 2655-2657; R. 4467, §§ 1.1-1.3). Moreover, the settlement provided for a structured claims and appeals process, as well as an avenue for accelerated relief. (R. 2655-2657; R. 2315-2317, § IV; R. 2320-2321, § VII).

In approving the *Cox* settlement, the Tennessee court scrupulously followed the requirements of Rule 23 of the Tennessee Rules of Civil Procedure and due process. First, the court directed that notice of the settlement be given to the class. (R. 2380-2384). In two separate hearings, the court addressed the issues related to adequacy of notice.

(R. 2922-3050; R. 3684-3943). The approved notice campaign cost over $12 million and was described by the experienced professionals who designed the program as one of the most comprehensive notice campaigns ever undertaken in class action litigation. (R. 3002; R. 3097-3210; R. 4456-4465). The Tennessee court afforded class members notice of the fairness hearing and an opportunity to exclude themselves from the class or object to the settlement. (*See* R. 2504-2760). On November 8 and 9, 1995, the court held an evidentiary hearing on the fairness of the proposed settlement that was open to all parties and class members. (*See* R. 2504-2760). Finally, on November 17, 1995, the *Cox* court approved the settlement, finding that the notice campaign was "unprecedented" in scope and effectiveness and that the settlement was fair, adequate and reasonable in all respects. (Shell App. 22, ¶ 16 and 28, ¶ 38).

On the same day, the *Spencer* court gave final approval to the class action settlement against DuPont. Simultaneously, Shell, Celanese, and DuPont entered into an agreement coordinating the two settlements. (R. 1756-1760). DuPont agreed to pay 10% of all CPRC costs associated with claims arising from PB plumbing systems with acetal insert fittings, and 10% of CPRC administrative expenses (excluding costs for *Cox* attorneys' fees or notice). (R. 1756). These payments by DuPont were to come out of the *Spencer* settlement fund. This coordination allows class members to file a single claim with the CPRC and obtain relief from both settlements.

B. Procedural Background

In 2002 the trial court in South Carolina granted Respondents' motion for summary judgment and dismissed Petitioners' claims. The trial court held that the Tennessee and Alabama judgments were entitled to full faith and credit and thus precluded Petitioners' claims. With respect to Petitioners' due process arguments, the trial court found that "the record unmistakably shows that

the [*Cox* and *Spencer*] courts fully considered all due process issues relating to [their] jurisdiction over absent class members and determined that jurisdiction existed." (Pet. 42a). Reviewing the record, the trial court stressed that "the *Cox* and *Spencer* judgments were fully litigated and decided – after several adversarial proceedings and on a voluminous record – by the respective Tennessee and Alabama courts." (Pet. 46a). Thus, it determined that "the judgments are entitled to full faith and credit in this court as guaranteed by the Constitution." (Pet. 47a). Petitioners appealed directly to the South Carolina Supreme Court.

On January 12, 2004, the South Carolina Supreme Court affirmed the decision of the trial court in *Hospitality Management Associations, Inc. v. Shell Oil Co.*, 356 S.C. 644, 591 S.E.2d 611 (S.C. 2004). The South Carolina Supreme Court found that procedures to ensure due process to absent class members "were not only in place in *Spencer* and *Cox*, but were also consciously and steadfastly utilized." (Pet. App. 26a). Consequently, the South Carolina Supreme Court agreed that "the trial court correctly accorded full faith and credit to the *Spencer* and *Cox* orders approving the nationwide settlements and properly granted summary judgment to respondents." (Pet. App. 27a).

REASONS THE PETITION SHOULD BE DENIED

I. There Is No Conflict Among the Circuits or State Courts of Last Resort Regarding Proper Application of Full Faith and Credit Principles to Class Action Judgments

Petitioners assert that a conflict exists among the federal circuits and/or state courts of last resort regarding the proper approach to the full faith and credit issue when a judgment approving a class action settlement is subsequently collaterally attacked. (Pet. 1-2). Petitioners are wrong.

It is well-established by this Court that, to grant full faith and credit to another court's judgment, the reviewing court must find that the procedures in the prior litigation afforded a full and fair opportunity to litigate the relevant jurisdictional issues. The South Carolina Supreme Court carefully determined that the *Cox* and *Spencer* courts fully and fairly considered the due process requirements necessary to exercise jurisdiction over Petitioners and other absent class members. Consequently, it correctly held that the final judgments of the Tennessee and Alabama courts were entitled to full faith and credit in South Carolina.

A. The South Carolina Supreme Court Properly Followed the Full Faith and Credit Principles Enunciated by This Court

Full faith and credit is a Constitutional guarantee for all state court judgments in which the rendering court had jurisdiction. U.S. CONST. art. IV, § 1 (codified at 28 U.S.C. § 1738); *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 (1982) (citing *Durfee v. Duke*, 375 U.S. 106, 110 (1963)). The full faith and credit analysis does not change for class action cases or judgments incorporating a class action settlement. To the contrary, in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 374 (1996), this Court held that class action judgments, like all other judgments, are "presumptively entitled to full faith and credit."

By its very nature, the issue of whether another court's judgment is entitled to full faith and credit involves some level of collateral review by a second court of the rendering court's judgment. In *Underwriters* this Court specified the precise inquiry the reviewing court is to make when determining whether full faith and credit is due another court's judgment – even when a party challenges the jurisdiction of the court rendering the judgment:

> [A] judgment is entitled to full faith and credit – *even as to questions of jurisdiction* – when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment. The [second court], therefore, should have determined in the first instance whether the [original court] fully and fairly considered the question of . . . jurisdiction. . . . If the matter was fully considered and finally determined in the [original] proceedings, the judgment was entitled to full faith and credit in the [second court].

Underwriters, 455 U.S. at 706-07 (citing *Durfee*, 375 U.S. at 111) and at 709 n.16 (*emphasis added*).

This Court applied the rule of *Underwriters* in a class action context in *Matsushita* when it found that a Delaware judgment approving a nationwide class settlement was entitled to preclusive effect. In *Matsushita* the Court assured itself that the due process requirements of *Shutts*[7] had been met merely by *referencing* the Delaware court's findings on these matters (notice, the opportunity to be heard, and adequacy of representation), which revealed they had been fully and fairly litigated in the rendering court. *Matsushita*, 516 U.S. at 378-79. Having verified that the Delaware court had addressed the relevant due process elements, this Court delved no further.

On remand, the Ninth Circuit rejected the exact argument Petitioners make here – that absent class

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[7] A state court class action judgment involving non-resident, absent class members is entitled to full faith and credit elsewhere when the rendering state court had jurisdiction. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985). To exercise jurisdiction over absent class members, a state court must provide them with minimum due process: (1) reasonable notice, (2) an opportunity to be heard and participate, (3) the right to opt out, and (4) adequate representation. *Id.* at 811-12.

members have a largely unfettered right to challenge collaterally the adequacy of representation in class actions. *Epstein v. MCA, Inc.*, 179 F.3d 641, 647-48 (9th Cir. 1999). To the contrary, relying on *Matsushita*, the Ninth Circuit held that "broad collateral review of the adequacy of representation (or of the other due process requirements for binding absent class members) is not available." *Id.* at 649. Absent class members' due process rights are protected, not by collateral review, but by the original certifying court. *Id.* Collateral review is limited to considering whether the procedures used by the rendering court afforded absent class members a "full and fair opportunity" to litigate any due process concerns. That review does not include any reconsideration of the merits of the due process issues. *Id.* at 648-49. In short, due process does not allow "collateral second-guessing" of the certifying court's determinations. *Id.* at 648. This Court then denied *certiorari*. 528 U.S. 1004 (1999).

Similarly, in *Fine v. America Online, Inc.*, 743 N.E.2d 416 (Ohio Ct. App. 2000), an Ohio court rejected plaintiffs' collateral attack on an Illinois nationwide class action settlement. Relying on *Matsushita*, *Shutts*, and *Epstein*, the Ohio court held that "the appropriate collateral review involves an examination of procedural due process and nothing more" because "to hold otherwise would create a form of collateral review that is inconsistent with both the spirit of the class action mechanism and the principles at the very core of the Full Faith and Credit Doctrine." *Id.* at 421. To satisfy itself that plaintiffs received the required due process in Illinois, the Ohio court looked at the Illinois court's express findings, determined that it considered the necessary factors, and held that any further inquiry was inappropriate. *Id.* at 422-23. This Court denied *certiorari* in that case as well. 532 U.S. 942 (2001).

Carefully adhering to the principles this Court outlined in *Underwriters*, *Matsushita*, and *Shutts*, the South Carolina Supreme Court – like the *Epstein* and *Fine* courts – held that proper review of another state's class action

judgment is limited to determining whether the due process issues were fully considered in the original litigation. Any other level of collateral review would be inappropriate because "it would run counter to the class action goals of efficiency and finality to allow successive reviews of issues that were, in fact, fully and fairly litigated in the rendering court." (Pet. App. 18a). As the South Carolina Supreme Court stressed, "second guessing the fully-litigated decisions of our sister courts would violate the spirit of full faith and credit." (Pet. App. 18a).

Having carefully examined the law applicable to the issue at hand, the South Carolina Supreme Court summed up the standard by which it reviewed the procedures employed in the *Cox* and *Spencer* actions and explained why it reached the unremarkable conclusion that those judgments were entitled to full faith and credit in South Carolina:

> [T]he proper scope of collateral review of a rendering court's rulings on the due process requirements for binding absent class members is one limited to a consideration of whether the procedures in the prior litigation allowed a full and fair opportunity to litigate the due process issues. It is our opinion that such procedures were not only in place in *Spencer* and *Cox*, but were also consciously and steadfastly utilized to accord minimum due process to the absent class members. Consequently, we hold the trial court correctly accorded full faith and credit to the *Spencer* and *Cox* orders approving the nationwide settlements and properly granted summary judgment to respondents.

(Pet. App. 26a-27a). This is precisely the full faith and credit analysis this Court mandated in *Underwriters*. Therefore the South Carolina Supreme Court did not err, and there is no reason to grant a writ in this case.

B. The *Stephenson* and *Homeside Lending* Decisions Do Not Conflict With the South Carolina Supreme Court Decision

Petitioners contend that the judgment of the South Carolina Supreme Court directly conflicts with the Second Circuit's decision in *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd*, 539 U.S. 111 (2003). (Pet. 16). However, *Stephenson* concerned an unusual situation not present here. Contrary to Petitioners' claim, *Stephenson* does not hold that broad collateral review of class action judgments is generally available to absent class members.

Stephenson concerned the Agent Orange nationwide class settlement approved by a federal district court in New York and affirmed by the Second Circuit. *In Re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987). It was only after all the settlement funds had been paid out to other class members that the *Stephenson* plaintiffs learned for the first time of their allegedly Agent Orange-related injuries and brought suit. The district court dismissed their claims, holding that they were barred by the settlement and their suit was an impermissible collateral attack on the prior settlement. *Stephenson*, 273 F.3d at 256.

On appeal, the *Stephenson* plaintiffs sought to avoid the settlement's preclusive effect by claiming that persons whose injuries manifested themselves only after all the settlement funds were depleted were inadequately represented in the class settlement. The Second Circuit allowed them to collaterally attack the class settlement *only* because there had been *no prior determination by any court* that "addressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the [class] settlement funds." *Id.* at 257-58. The Second Circuit stressed that for this reason its ruling was *not* inconsistent with the Ninth Circuit's *Epstein* decision:

> Here, neither the district court nor this Court has determined the adequacy of representation *with respect to these plaintiffs* whose injuries did not arise until after the settlement expired. Without adopting the Ninth Circuit's decision in *Epstein*, we conclude that plaintiffs' collateral attack is proper even under its standard.

Id. at 258 n.6 (emphasis in original).

Nothing in *Stephenson* indicates broad collateral review would be available generally to class members who were aware of their injuries at a time when they could make claims and obtain a share of the settlement. In fact, the Second Circuit specifically noted that it had previously rejected a collateral attack on the Agent Orange settlement brought by absent class members who were eligible for compensation under the settlement. *Stephenson*, 273 F.3d at 253-55 (citing *Ivy v. Diamond Shamrock Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 996 F.2d 1425 (2d Cir. 1993)). Petitioners here bear no resemblance to the *Stephenson* plaintiffs whose collateral attack was allowed only because their injuries manifested themselves for the first time after all settlement funds had been depleted. Rather, they are in the same position as the *Ivy* plaintiffs whose collateral attack was rejected by the Second Circuit. Petitioners were fully aware of their claims and had every opportunity to participate in the *Cox* settlement. They simply choose not to avail themselves of that remedy. Even the Second Circuit would not allow such absent class members to collaterally attack the settlement.

Likewise, Petitioners assert that the Vermont Supreme Court's decision in *State of Vermont v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003) – in which that court refused to grant full faith and credit to a class action judgment rendered by an Alabama court – also conflicts with the South Carolina ruling. (Pet. 9, 16). Petitioners' reliance on *Homeside Lending*, however, is similarly misplaced.

In *Homeside Lending*, the Vermont Supreme Court held that Vermont mortgagors were not precluded from challenging the notorious *Hoffman* decision – where an Alabama court approved a class action settlement that resulted in absent class plaintiffs frequently "paying more in attorneys' fees to class counsel than the economic benefit they received from 'prevailing' in the litigation." 826 A.2d at 1002 n.4. Although the Vermont Supreme Court gave three reasons for its decision, the common thread among them was that the settlement transformed the *Hoffman* class members into the functional equivalent of defendants by effectively turning the "plaintiffs" into actual or potential debtors to their own class counsel.[8] *Id.* at 1008, 1010, 1015, 1017. Not only did the class members lack adequate notice of their exposure to this liability, but no one – class counsel, the defendants, or the Alabama court – was looking out for the class members' interests in this regard.

Although the defendants urged the Vermont Supreme Court to give full faith and credit to the Alabama judgment, the court declined to do so because the Alabama court in *Hoffman* never addressed the due process issues associated with effectively converting plaintiff class members into defendants and failing to warn them of their exposure to liability. *Id.* at 1019. Thus, the decision in *Homeside Lending* has no relevance to the situation here. The facts are completely different, and, as the South Carolina Supreme Court correctly found, the *Cox* and *Spencer* courts fully and fairly considered the relevant due process issues about which Petitioners complain.

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[8] The Vermont Supreme Court noted the case of one class member whose only recovery as a result of the class settlement was $2.19 in interest, but who paid an attorney's fee of $91.33. *Id.* at 1003, n.5.

II. The South Carolina Supreme Court Correctly Held That the *Cox* Judgment Was Entitled to Full Faith and Credit Under the Constitution

Having correctly concluded that the full faith and credit due state court class action judgments is determined by examining the due process procedures utilized by the rendering courts, the South Carolina Supreme Court then turned "separately to a review of the procedures utilized by the foreign courts to ensure proper notice and adequate representation."[9] (Pet. App. 19a).

A. The South Carolina Supreme Court Properly Rejected Petitioners' Challenges to the Manner of Giving Notice to *Cox* Class Members

Petitioners complain that the *Cox* notice program was deficient because not all class members were given personal notice, as opposed to the multi-media notice-by-publication campaign.[10] (Pet. 17-20). Both the trial court and the South Carolina Supreme Court considered this argument and properly rejected it.

First, as the trial court held, "individual notice is not necessarily required to meet the requirements of due process." (Pet. App. 50a). Rather, as the South Carolina Supreme Court noted, the standard for notice established by this Court is that it must be "the best practicable, 'reasonably calculated, under all the circumstances, to

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[9] Because Shell was not a party to the *Spencer* settlement, this brief addresses primarily the procedures employed by the *Cox* court to ensure that absent class members were accorded due process.

[10] As the South Carolina Supreme Court noted, "over 5.6 million individual mailed notices were sent; of those, 244,756 were mailed to South Carolina addresses. In addition, there was a toll free 800 telephone number set up to field questions about the settlement. More than 1 million calls were received and over 10,000 additional notices were mailed out." (Pet. App. 19a).

apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (Pet. App. 21a) (citing *Shutts*, 472 U.S. at 812, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Applying that standard, the trial court concluded:

> The record clearly reveals that the *Cox* and *Spencer* courts carefully considered the issue of how to best provide notice to unknown class members and that the issue was fully and fairly litigated. As such, their decisions that the respective notice campaigns provided the best practicable notice under all the circumstances are not subject to relitigation in this Court, and the Plaintiffs' argument provides no basis for denying full faith and credit to the *Cox* or *Spencer* judgments.

(Pet. App. 52a-53a). The South Carolina Supreme Court agreed:

> Clearly, the *Cox* court designed and utilized various procedural safeguards to guarantee sufficient notice under the circumstances. Pursuant to a limited scope of review, we need go no further in deciding the *Cox* court's findings that notice met due process are entitled to deference.

(Pet. App. 22a).

A review of the *Cox* court's findings amply supports these conclusions. First, the *Cox* court analyzed the circumstances and made the determination that not all Settlement Class members were readily identifiable:[11]

> Since not all Settlement Class members were known or readily identifiable, the notice program implemented in this case combined multimedia

[11] Petitioners do not contend *Cox* class counsel or Respondents had access to any readily available list of all class members.

> publication (newspapers, magazines, radio and television), individual mailed notice, ongoing press and media outreach, and a toll-free telephone information service. The purpose of the program was to make potential Settlement Class members aware of the Action and the Settlement, and to encourage them to identify themselves to the notice providers, so they could receive further written notices and information, and be placed on the notice providers' Settlement Class member database.

(Shell App. 23, ¶ 19). Second, the *Cox* court reasonably concluded that the multi-faceted, multi-media campaign designed by experienced class notice experts complied with the *Shutts* standard of giving "the best notice practicable under the circumstances . . . to members of the Settlement Class." (Shell App. 27, ¶ 33). In reaching that conclusion, the *Cox* court noted that other courts had used successfully multi-faceted notice programs for large consumer or product liability class actions where most class members could not be identified at the outset. (Shell App. 27, ¶ 31).

The *Cox* court carefully considered the adequacy of the notice on four separate occasions – when it preliminarily approved the settlement and the notice program after conducting two additional hearings and entertaining objections to the forms of notice, and at the fairness hearing itself. The *Cox* court's Final Order contains detailed findings regarding the extensive scope and reach of the notice campaign. (Shell App. 22-27, ¶¶ 15-30). The *Cox* court also found it significant that the settlement provided for supplemental "notice every three years through the life of the program." (Shell App. 21, ¶ 12(e)). After considering all of the evidence, the *Cox* court found that the notice campaign "as designed and implemented, met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in [*Shutts*]." (Shell App. 27, ¶ 32). The *Cox* court concluded that "the notice program is one of the most comprehensive class notice campaigns ever

undertaken," that "all reasonable efforts have been made to reach affected consumers," and that "the best notice practicable under the circumstances has been provided to the settlement class." (Shell App. 16; Shell App. 27, ¶ 33).

Because the *Cox* court squarely addressed the notice issue, this Court's decision in *Underwriters* required the South Carolina courts to give full faith and credit to the *Cox* judgment.

B. The South Carolina Supreme Court Properly Rejected Petitioners' Arguments About the Content of the *Cox* Class Notice

Petitioners also contend that the *Cox* notice failed "to make complete and adequate disclosure" of various things they claim were wrong with the *Cox* settlement. (Pet. 20-21). This contention too is foreclosed by the *Cox* court's findings.[12]

The *Cox* notice informed class members of the nature of the pending litigation, including a description of the lawsuit, the nature of PB plumbing, the criteria for being a member of the Settlement Class, the plaintiffs' allegations, and the relief sought. (R. 3960-3961). Second, the notice extensively described the terms of the proposed settlement, including the settlement fund, eligible claimants, the recovery program, the deadline for claims, the required releases and assignments, and attorneys' fees.[13] (R. 3961-3963). Third, the notice informed class members that complete information was available by calling a toll-free number, by inspecting the court files, or by writing to class

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[12] The *Cox* court found that the "notice accurately and adequately advised [class members] of this action; the proposed settlement and its terms, features, and benefits; their rights and options; and the applicable procedures and deadlines for exercising them." (Shell App. 27, ¶ 33).

[13] Contrary to Petitioners' argument (Pet. 21), the notice did disclose the amount of attorneys' fees to be paid to *Cox* class counsel. (R 3963).

counsel. (R. 3965). Finally, the *Cox* notice informed class members of the procedure for opting out and of the time and place for the fairness hearing and their right to participate and be heard. (R. 3964-3965). As a result, the *Cox* court found that the notice "fully and accurately informed Settlement Class members of all material elements of the proposed Settlement" and complied with all applicable legal standards. (Shell App. 13; *see also* Shell App. 27, ¶¶ 32, 33).

The South Carolina Supreme Court agreed, finding that the notice in *Cox* "explained the terms of the settlement, provided for the opportunity to participate (*e.g.*, by filing objections and appearing at the fairness hearing), and gave information on how to opt out." (Pet. App. 20a-21a). As such, the South Carolina court found that the *Cox* notice complied with due process. (Pet. App. 22a).

Some of Petitioners' specific criticisms about the content of the notice mimic objections to the *Cox* settlement filed by various parties, all of which were contested by *Cox* class counsel and Shell and Celanese. (R. 2468-2478; R. 3362-3385). For example, the objection was made in *Cox* that the notice did not tell class members the settlement was allegedly not commensurate with prior jury verdicts and settlements. (R. 3378). Petitioners' claim that the notice did not tell class members "thousands of objectors" were persuaded to drop their objections by the payment of "disparate settlements" was also considered: the *Cox* court found "there is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* settlement." (Shell App. 33, ¶ 66). The *Cox* court considered and rejected objections relating to the assignment to the defendants of class members' claims against DuPont. (Shell App. 30, ¶¶ 42, 45, 46).[14] In response to these objections, the *Cox* court

[14] The *Cox* court also anticipated and rejected Petitioners' criticism (Pet. 6) that the notice did not describe the results of the further settlement negotiations conducted under the supervision of Judge

(Continued on following page)

held that "[t]he notice provided to the Settlement Class was neither misleading nor defective." (Shell App. 31, ¶ 50).

Other of Petitioners' complaints fundamentally misconceive the function of a class notice. They argue that the *Cox* notice also should have described various things about the settlement they claim were objectionable, *e.g.*, that the remedy offered was allegedly not as valuable as that being provided by the defendants already under a voluntary claims adjustment process. (Pet. 20). In other words, the notice should have contained arguments Petitioners think could have been made against the *Cox* settlement. That is not the function of a class notice. There is "no obligation to include arguments for or against the settlement in the notice." *Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir. 1974).

C. There Is No Due Process Requirement That Notice Actually Be Received

Petitioners argue that because they did not receive notice[15] and never appeared in either *Cox* or *Spencer*, they remain free to litigate anew their various due process challenges to those settlements. (Pet. 15, 22). Not surprisingly, Petitioners cite no authority for this proposition

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Silver in California, which obviously it did not because the notice was published prior to those negotiations:

> There is no need to provide additional notice to the entire Settlement Class by reason of the revised terms of the Settlement since the Court approved the notices disseminated to the Settlement Class. All changes have been to improve the Settlement over that described in the notices, and none of the changes has an adverse impact on any Class member.

(Shell App. 33-34, ¶ 67).

[15] For the purpose of summary judgment, Respondents accepted as true Petitioners' allegation that they never received notice of the *Cox* or *Spencer* settlements.

because their argument runs counter to the very representational nature of a class action.

This Court long ago noted that a class action, or a "representative" suit, is an exception to the rule that one cannot be bound by a judgment *in personam* unless one was made fully a party in the traditional sense. *Shutts*, 472 U.S. at 808 (citing *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940)); *see also* 7B Wright, Miller, & Kane, *Federal Practice and Procedure* § 1789 at 238 (2d ed. 1986). There is no requirement that a class member must "appear" in a class action to be bound by the resulting judgment. The plaintiffs in *Matsushita* and *Epstein* did not appear in the Delaware court proceedings they were trying to challenge collaterally. *Matsushita*, 516 U.S. at 372. Both this Court and the Ninth Circuit held they were bound by the Delaware class settlement and could not attack it collaterally. The whole point of the *Shutts* minimum due process requirements is to establish when an absent class member will be bound *even though he does not appear*. Moreover, *Shutts* does not require that an otherwise constitutionally sufficient notice be actually received. *E.g.*, *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).

D. The South Carolina Supreme Court Properly Held That the *Cox* Court Addressed Adequacy of Representation Issues

Petitioners allege that, for a variety of reasons, the representation of the class by *Cox* and *Spencer* class counsel was inadequate. (Pet. 24-28). The South Carolina Supreme Court did not find it necessary to address the merits of these various objections. The court found it "patent that both the *Spencer* and *Cox* courts had procedures in place to ensure adequate representation." (Pet. App. 25a). Moreover, the court concluded, based on its review of the record, that such procedures were implemented throughout the *Cox* and *Spencer* proceedings. (Pet. App. 26a). In fact, the *Cox* court specifically addressed

most of Petitioners' complaints about the conduct of *Cox* class counsel.

1. There Was No Conflict Between Class Counsel and the Class

Petitioners claim that class counsel suffered two "disabling conflicts" of interest with the class: First, they say *Spencer* class counsel accepted a $30 million fee payment allegedly in exchange for withdrawing their objections to the *Cox* settlement and assigning $120 million of *Spencer* settlement proceeds to the *Cox* fund, which allegedly reduced the amount of Shell and Celanese's commitment to the *Cox* settlement. Second, they argue that, simultaneous with the class settlements, *Spencer* class counsel Fleming settled separately his individual clients' claims at "greatly disparate amounts." (Pet. 24-28). However, the *Cox* court itself fully considered and rejected similar objections.

For example, the *Cox* court addressed the objection that the assignment to Shell and Celanese of class members' claims against DuPont had the effect of reducing the value of the *Cox* settlement by the $120 million amount of the *Spencer* settlement, (*see* R. 2469-2474, ¶¶ 2B, 2F, 2L, 2X; R. 3362-3385), and held:

> Certain objectors have asserted that the proposed Settlement must be reduced by a proposed settlement of claims against DuPont in the *Spencer* case pending in the Circuit Court of Greene County, Alabama, which the objectors characterized as a $120 million settlement. . . .
>
> The Settlement before this Court, in the minimum amount of $950 million, provides for the assignment of Settlement Class members' claims against DuPont and others to defendants Shell and Celanese.
>
> Objectors are incorrect in asserting that the "credit" arising from the assignment reduces the Defendants' contribution to the Settlement. The

> original *Cox* settlement was $850 million to be paid by the Defendants. The revised *Cox* settlement requires the Defendants to pay a minimum of $950 million to consumers with assignment of rights, against DuPont, regardless of whether DuPont ultimately participates in the settlement. The revised *Cox* settlement substantially increases benefits to consumers.

(Shell App. 30, ¶¶ 42, 45, 46).

The issue of fees for *Cox* and *Spencer* class counsel was scrutinized by not one, but two courts. Acting as a settlement judge, Judge Richard Silver of the Monterey Superior Court in California actively supervised the negotiations among *Cox* counsel, *Spencer* counsel, and Respondents. In recommending the final settlement, he noted that he was especially vigilant in watching for possible conflict between class counsel and the class over the subject of attorneys fees. In his November 8, 1995 report he wrote:

> Before I would agree to recommend the settlement, it would have to meet a class fairness standard. I felt this to be essential to insure that the resolution of the differences did not turn on attorneys fees. . . .
>
> * * * * *
>
> Regardless of the amount of fees, as I stated above, I set my own standards of fairness for the class and acted as a buffer against any claim that the class would suffer on account of fees.

(Shell App. 2, 9). Thereafter the *Cox* court found, with respect to the same concern about attorneys fees, that "[t]here is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel." (Shell App. 33, ¶ 64).

Judge Silver also rejected the claim that one of the *Spencer* class counsel suffered a "disabling conflict" by virtue of his simultaneous settlement of his individual cases:

> I was particularly sensitive to insuring independent negotiation with the individual Texas claimants and the class so that the former would not control the latter. Although I was seeking global settlement, I made it clear that if an appropriate settlement was reached with the class, and no settlement could be reached in Texas, so be it. In fact Fleming had little or no participation in negotiating the class settlement. There was absolutely NO "private inventory sale" conditioned on class settlement. No doubt I was also concerned that, because of previous animosity, Fleming not be improperly "cut out"; however, in no way would I permit him, nor did he ever try, to condition class settlement on his settlement
>
> . . . .
>
> I believe the individual settlement of his claims is rational and reasonable and does not provide inappropriate "betterments."

(Shell App. 7). Similarly, the *Cox* court found that "[t]here is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* settlement." (Shell App. 33, ¶ 66).

Because the *Cox* court addressed these issues, Petitioners were not entitled to relitigate them.

2. *Cox* Class Counsel Conducted Themselves Properly

Petitioners also contend that the conduct of *Cox* class counsel demonstrates inadequate representation. (Pet. 26-27).

However, this issue was fully litigated in the underlying litigation. The *Cox* court found that the settlement resulted from good-faith, arms-length, non-collusive negotiations (Shell App. 18), in which every aspect of the Settlement Agreement was the "subject of intense preparation and negotiation, from the amounts, to the terms, to the amount of leaks, to who was covered, to how long they

would be covered, [all of which] was gone over in detail." (R. 3723). In fact, the final settlement was the result of a two-week settlement conference overseen by Judge Silver in which numerous enhancements to the original settlement were achieved for the benefit of the class. (R. 2516-2518; R. 2572-2577; R. 2647-2655). Judge Silver's report verifies class counsel conducted themselves properly and that no extraneous factors, such as attorneys fees or class counsel's individual cases, altered the negotiations. (Shell App. 1-10).[16]

Impressed by the procedures utilized in the rendering court, the South Carolina Supreme Court stressed:

> The *Cox* court responded specifically to various objections to class counsel's alleged conflicts of interest and found such allegations to be without factual support. Indeed, the court commented on class counsel's professionalism in protecting and promoting the interests of the class. The [*Cox*] court also found that the $45 million in attorneys' fees represented only approximately 5% of the settlement fund and were not deducted from the settlement fund.

(Pet. App. 26a). After methodically examining the due process measures employed by the Tennessee court, the South Carolina Supreme Court reached the unremarkable conclusion that the *Cox* judgment was entitled to full faith and credit in South Carolina.

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[16] Petitioners' argument that *Cox* class counsel failed to adequately value the class claims is premised on a phony statistic. They claim *Cox* class counsel settled for $150 per unit. (Pet. 26). This amount is the result of dividing $950 million by the estimated 6,000,000 PB plumbing units in the United States. But the resulting $150 figure is unrelated to the relief given the class: an eligible class member is not limited to recovering $150 for his unit. He gets a replumb of his unit no matter how much it costs. (R. 2284, § 6.3). Appellants' misuse of statistics proves nothing and was properly ignored by the South Carolina courts.

E. Petitioners' *Amchem* Arguments Are Irrelevant to This Case

Based on this Court's decision in *Amchem Products v. Windsor*, 521 U.S. 591 (1997), Petitioners argue that adequacy of representation could be achieved in *Cox* and *Spencer* only by dividing the class into sub-classes. (Pet. 8-9, 23-25). However, there are two fundamental problems with Petitioners' reliance on *Amchem*.

First, *Amchem* was not decided until more than 18 months after the judgments in *Cox* and *Spencer* became final. While *Amchem* might control the disposition of cases open for *direct* review at the time of its issuance, judgments open only to *collateral* attack are shielded from such retroactive application. *See, e.g., Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). As this Court has written, "retroactivity in civil cases must be limited by the need for finality; once suit is barred by *res judicata* or by statutes of limitations or repose, a new rule cannot reopen the door already closed." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991).

Second, Petitioners' *Amchem* argument ignores the distinction between collateral and direct review of judgment. *Amchem* was a direct appeal from a judgment approving a class settlement. Direct review of class certification orders involves a *de novo* review of the applicable legal principles under an abuse of discretion standard. *See Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979); *see also Amchem*, 521 U.S. at 630 (Breyer, J., Stevens, J., concurring in part, dissenting in part). On the other hand, *Matsushita* and *Epstein* establish that a court entertaining a collateral attack on a class settlement may not determine independently whether it believes the class was adequately represented. That determination is for the court rendering the judgment and those courts to which a direct appeal to the judgment would lie. The *Cox* court found that the adequacy of representation requirement was met. Under

Matsushita and *Epstein* that determination is not subject to "second-guessing."

The South Carolina Supreme Court held it was not necessary to address either Petitioners' or Respondents' arguments about *Amchem*. (Pet. App. 25a). Instead, the South Carolina Supreme Court considered it dispositive that "both the *Spencer* and *Cox* courts had procedures in place to ensure adequate representation" and "that such procedures were implemented throughout." (Pet. App. 25a-25b). Therefore, the South Carolina Supreme Court reasoned, the *Cox* and *Spencer* judgments were entitled to full faith and credit.

In any event, there is no merit to Petitioners' contention that the interests of class members diverged in any meaningful way. All *Cox* class members, whether owners of a single family house or owners of multi-family units, shared the same goal of getting relief for any plumbing that leaked. The *Cox* settlement addresses that goal in a common manner: dwelling units that have experienced qualifying leaks gets replumbed. (R. 2284, § 6.3).

In reality, Petitioners' complaint is about the substantive terms of the *Cox* settlement: Petitioners believe that the terms are not as generous as they should have been. But the adequacy of the relief does not bear on the issue whether the trial court correctly extended full faith and credit to the *Cox* judgment. *Matsushita* and *Epstein* make clear that full faith and credit analysis does not permit any subsequent inquiry into the merits of a final class settlement. The scope of collateral review is limited to ascertaining whether the rendering court's procedures afforded class members due process. As the South Carolina Supreme Court correctly observed, "'[m]ere disagreements with the terms of a settlement cannot provide grounds for a collateral attack' on a class settlement." (Pet. App. 26a, *quoting Fine*, 743 N.E.2d at 423).

Finally, there is no merit to Petitioners' complaints about the inclusion in the *Cox* settlement class of future claimants.[17] The *Cox* settlement, however, avoids any *Amchem* notice issue by providing for successive notices to class members – every three years until the end of the program in 2009 – and giving class members who first purchased a structure of PB plumbing since the last notice the right to opt out. (Shell App. 21, ¶ 12(e); R. 2288-2290, § 9). In addition, the *Cox* settlement has several features that ensure protection of future eligible claimants and thereby eliminate any conflict between current and future claimants. For example, there is no cap on the number of claims payable. The $950 million settlement amount represents only a minimum contribution by the *Cox* defendants (*i.e.*, Shell and Celanese may contribute more if the number of claims so require it). (R. 2280, §§ 4.5.2, 4.5.3). And, if any future claimants are not afforded the relief for which they are eligible under the *Cox* settlement, they retain their rights to pursue their underlying claims against Shell and Celanese with all applicable statutes of limitations and repose tolled. (R. 2300, § 22.2).

Therefore, no conflict of interest existed in *Cox* that would necessitate separate representation of sub-classes under the Court's reasoning in *Amchem*.

CONCLUSION

The petition for writ of certiorari should be denied. The Tennessee court conscientiously followed the requirements of due process in approving the *Cox* settlement. In granting full faith and credit to the *Cox* final judgment, the South Carolina courts properly applied the rules this Court outlined in *Shutts*, *Underwriters*, and *Matsushita*. As a result, Respondents were entitled to summary judgment

[17] Petitioners themselves are not members of this group of future claimants for whom they express such solicitude. Accordingly, it is not likely that Petitioners have any standing to assert this issue.

dismissing Petitioners' collateral attack on the *Cox* settlement.

Respectfully submitted,

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APPENDIX

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MONTEREY

Date: November 8, 1995

Hon. Richard M. Silver	Judge: Bailiff:	Deputy Clerk Reporter

HELEN MEERS et al **Plaintiffs,** **vs** **SHELL OIL COMPANY, et al,** **Defendants.**	**No. M 30590** **Minute Order:** **RECOMMENDATION RE: SPENCER/COX SETTLEMENT** **RMS/bf**

APPEARANCES

Pursuant to the joint order of SPENCER, COX, and MEERS this court conducted a mandatory settlement conference commencing October 23, 1996 and continuing through November 7, 1996. At the beginning of the sessions the court explained its role and the competing interests. It is important to reiterate several of those points in this minute order.

This litigation has been ongoing for almost 10 years. Two national class actions are now pending with the plaintiff consumers represented by different counsel. A substantial number of individual cases are pending in Texas. Settlements representing small groups of consumer plaintiffs had been reached in the past. Two settlements in San Diego County have been recently consummated. If global agreement was not reached, this litigation could continue for another 10 years. The competing parties each had substantial disagreements

with settlements that had been reached in the two national class actions. It was the stated purpose of these settlement discussions to achieve global resolution of the two national class actions and the individual cases in Texas. If a fair and appropriate global settlement could be reached, I indicated I would recommend its approval to each of the courts presiding over the national class actions and also recommended that the courts presiding over the numerous state class actions accord the settlement full faith and credit.

In addition to the above I also defined my role. It was important that everyone understood that settlement, simply for the purpose of settlement, was not appropriate. Before I would agree to recommend the settlement, it would have to meet a class fairness standard. I felt this to be essential to insure that the resolution of the differences did not turn on attorney fees and, just as significantly, to insure that there was a reasonable relationship between the class settlement and the settlement of the individual cases pending in Texas. Obviously these are also matters to be considered by the judges in the required fairness hearings. I reiterate these points to assure all courts that these concerns were not overlooked and, in fact, guided all my settlement discussions and my recommendations.

I perceived several points of concern with respect to both national class action settlements and the Texas settlement. They related to the extent of the funding, definitions of the class and qualifying leaks, monitoring performance, and establishing an appropriate basis for differentiating individual settlements in Texas. I also wanted to make sure that any differences with the recent settlements in San Diego were rationally distinguished.

Of great concern was finally reaching global settlement so that the consumer plaintiffs across the nation could receive similar relief and begin to receive it soon.

When the discussions started the animosity between counsel and the parties was significant. It was clear that I needed to deal with this issue in order to make significant headway. For this reason I forced people to stay together and continue to discuss the issues, notwithstanding the intensity of these discussions. There is no doubt that I disapproved of some of the discussions. As people began to come together I let it be known, in no uncertain words, that as we moved forward into the next step in the negotiations that I would no longer tolerate these animosities to control the discussions. The change was significant, and we did move forward for purposes of reaching global resolution.

All settlements, by definition, involve compromise. In making these comments it is not my intent to suggest that any counsel's motivations were improper. Each had valid arguments. In summary, it was my intent to aide in finding a rational basis for compromise and at the same time make sure that the settlement met class fairness requirements. I believe it does do so for the following reasons:

1. Funding: Under COX I questioned whether the fund was sufficient to be a truly national class resolution. If it was insufficient, then the litigation would only be delayed, not ended, and benefits to class members who were not "first in line" could be non-existent. Underfunding would also put those individuals and the judicial system to a risk of 10 more years of litigation. Under COX any funds paid by DUPONT in Spencer

would potentially reduce the fund. In addition the agreement was unclear as to the disposition of any funds received from ELGERS. This raised a possibility of substantial potential reductions in the net "fund". On the other hand I also perceived that the funding demands by SPENCER counsel and Fleming were best case scenarios and subject to substantial contrary legal arguments. I also had significant concerns with the SPENCER/DUPONT settlement in that the 8% payment on replumbs would require a consumer to completely replumb and pay and pay [sic] the costs, only to receive a small amount in return. As a result my goal was, if possible, merge the two settlements, or, as a minimum, achieve a funding level that would most probably accommodate all persons who have had qualifying leaks, pay persons unreimbursed damages they have suffered, and provide an extended "warranty" period of time, with sufficient probable funding, for those persons suffering qualifying leaks during this period. Evaluating the numbers of people responding to both notice programs, the number of individual claimants in Texas, and the numbers of persons already having received benefits through other settlements or relief, I believe the funding under these combined settlements meets this goal and that the probability of further litigation, as a result of underfunding, is minimal. In fact, with the increased funding, addition of the contingent ELGER's funding, and the independent settlement of the substantial number of claims in Texas, it appears to at least triple the net funds available. I realize that there was no limit in San Diego. However you cannot compare a settlement in a small area with a settlement for the nation. I believe that the funding level here will most probably satisfy this problem. Although all plaintiff's counsel

would have liked more, it is unrealistic to believe that the defendants would so agree and still give up the substantial legal and factual arguments that are compromised in this agreement. I believe this settlement represents a fair compromise and greatly diminishes the chance that the fund will run out before completion of its terms.

2. Class definitions and Time periods: COX had a window period of one year. Other settlements had longer periods of time. The definitions of qualifying leaks differ in some of the settlements. COX does not count a hot water leak within 6 feet of the water heater as a first leak toward a replumb unless it requires cutting into a wall, others do. Significantly, any such leak allows for a claim for damages. There are significant factual disputes as to this issue. The limitation is only as to a first leak; it only applies if no cut into the wall is required; the evidence suggests that if the system is defective there is a probability of multiple leaks. This makes sense. The modified settlement does provide for an extended window period from one year to two years. The remainder of the time periods are consistent with past settlements. With the modification of the extended window period, I believe the definition of the class and the qualifications are fair to the consumer class and represent a fair compromise of the competing legal and factual disputes.

3. Monitoring: The settlement as modified creates a new plumbing claims group that will have plaintiff representations from both COX and SPENCER and the defendants. If there are disputes, they are to be resolved by the judges of the national class action or a special master appointed by them. This process insures prompt

attention to replumbing and payment of damages, an even handed evaluation of claims and requests for treatment as "exceptional circumstances", and a fair method of resolution of disputes. Of significance is the monitoring of the replumb procedures by plaintiffs counsel and the court.

4. Plaintiff's counsel take on the affirmative obligation to seek the relief provided for in the ELGER/US Brass settlement and, in the event funding is insufficient, to continue with the litigation. Although I had no doubt that they would do so, I felt it important to affirmatively so represent this in the agreement.

Many of the settlements in these actions have had some differing provisions. In part they are "trade-offs" depending on the particular situation. I believe this settlement is as good as or better than the settlements in San Diego. This settlement pays for unreimbursed damages, San Diego does not. The final date for submission of claims is significantly longer in this settlement than in San Diego. This settlement includes metal fittings; San Diego does not. Of great significance is the fact that this settlement provides for ongoing monitoring of claims by class counsel and court review in the event of disputes, in addition to the ombudsmen process. I am bothered by the failure to include that in San Diego. In that settlement the ombudsmen review is very limited, and in good part limited to the information provided by defendants. Review and monitoring by class counsel is also limited. The increased window period here, although slightly less than San Diego, is adequate and compensates for the qualifications on leaks. Overall, the provisions of and improvements to COX/SPENCER,

as reflected in the this [sic] settlement, leads me clearly to the above conclusion.

In addition to the above, it is important that I emphasize certain points. One lawyer continually proposed that we create a national class action in California and merge the other two into this new action. Although I considered his request, I continually told him I saw no basis or need for this. I told him I was acting only as a settlement judge. This role permitted me to monitor the settlement process and still permit independent review at the fairness hearing by the other respective courts. The Alabama and Tennessee courts are perfectly capable of monitoring the global settlement and are the proper courts to do so. The expenses associated with a whole new notice program would be ill spent and not necessary.

I was particularly sensitive to insuring independent negotiation with the individual Texas claimants and the class so that the former would not control the latter. Although I was seeking global settlement, I made it clear that if an appropriate settlement was reached with the class, and no settlement could be reached in Texas, so be it. In fact Fleming had little or no participation in negotiating the class settlement. There was absolutely NO "private inventory sale" conditioned on class settlement. No doubt I was also concerned that, because of previous animosity, Fleming not be improperly "cut out"; however, in no way would I permit him, nor did he ever try, to condition class settlement on his settlement. It was I who always kept us concentrated on global settlement.

I believe the individual settlement of his claims is rational and reasonable and does not provide inappropriate "betterments". As indicated above, because of the law relating to class action, monitoring this issue was one of my responsibilities. His clients that will receive some greater relief are all persons who have actively participated in the litigation process. They are all named parties in lawsuits and have participated in some significant way in the litigation, i.e., had their units inspected and/or answered interrogatories or been deposed. All settlements, including those negotiated by attorneys in this case, have acknowledged greater compensation for individuals who have been named class representatives and/or actively participated in the litigation.

I also monitored the proceedings to insure there was no wrongful "trade of rights" between clients. I had a specific discussion concerning some of the previous demands with counsel. It was understood that some demands were a "really best case scenario" that would require extremely favorable findings of disputed facts and law, and there was appropriate room for compromise.

There appears to be a significant misunderstanding of the modified agreements by some counsel. There is no inappropriate switching of "opt outs", nor would I allow it. As noted above there are now substantial improvements reflected in these settlements. With these improvements reflected in these settlements. With these improvements there is nothing wrong with merging the processes and allowing individuals another opportunity to consider whether they really want to "opt out".

The fees and costs in this case are significant. Many attorneys participated on all sides. The litigation was hard fought and complex. The fees will be divided between many attorneys and firms. I did not participate in the setting of fees. They do not come out of the fund. Regardless of the amount of fees, as I stated above, I set my own standards of fairness for the class and acted as a buffer against any claim that the class would suffer on account of fees.

It was my intent to try to resolve all disputes. Unfortunately we could not achieve settlement with DUPONT, primarily as a result of their dispute with SHELL and HOECHST CELANESE. I trust and hope that matter can also be settled. As a result all actions will remain pending against DUPONT, and it will be the responsibility of Judge Hardaway to determine the appropriateness of the proposed SPENCER/DUPONT settlement at a fairness hearing.

I commend all counsel for their efforts and hard work and their willingness to ultimately put aside the strong feelings that had separated them and to bring this matter to resolution. I regret that settlement could not be reached with Dupont. I commend the attorneys for Shell and Hoechst Celanese and those corporations for their willingness to proceed with the settlements with the class on the same terms and conditions and not permit the difficulties with Dupont to prejudice the class.

All of the above will be reviewed by Judge Maloan and Judge Hardaway at the fairness hearing and by each state court judge who considers these matters. All I can say is that I was fully aware of my responsibilities

and do not make this recommendation lightly. As I told all counsel, when I put my "stamp of approval" on this settlement, and make this recommendation, it reflects on my credibility. I would not and do not make this recommendation "lightly".

With the assumption that final settlement document will be prepared reflecting the principles of agreement, for the above reasons, I recommend approval of the settlement and that all concerned courts accord it full faith and credit.

A copy of the final principles of agreement and settlement document, as reviewed by this court, will be presented to all courts and counsel by the attorneys.

DATED: 11-8-95

/s/
RICHARD M. SILVER
Judge of the Superior Court

IN THE CHANCERY COURT
FOR OBION COUNTY, TENNESSEE

AT UNION CITY, TENNESSEE

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,	) Civil Action No. 18,844)) CLASS ACTION)) OBION COUNTY
Plaintiffs,	
v.	
SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION,	
Defendants.	

FINAL ORDER APPROVING THE CLASS ACTION SETTLEMENT, ATTORNEYS' FEES AND EXPENSES, AND AWARDS TO REPRESENTATIVE PLAINTIFFS

(Filed Nov. 17, 1995)

This matter is before the Court on motion by the parties[1] for final approval of their proposed settlement

[1] The parties are the named individual and representative *Cox* plaintiffs, on behalf of the certified Settlement Class, and defendants

(Continued on following page)

(the "Settlement") as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application"). A duly noticed hearing on the motion and Application was held on November 8 and 9, 1995, (the "Fairness Hearing") pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the Settlement and the August 7, 1995, order conforming the class definition (collectively the "Preliminary Approval Order"), under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

Notice of the Fairness Hearing was given to potential class members nationwide in accordance with the Preliminary Approval Order and the Court approved notice program. Voluminous pleadings and briefs were submitted by the settling parties in support of the Settlement and in response to all objections and motions filed regarding the Settlement, including the various objections and related papers filed by objector Tony Martin, *et al.*, and affiliated objectors through their attorneys (the "Martin Objectors"). The parties, numerous interested members of the Settlement Class, and others appeared at the Fairness Hearing, either individually or

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Shell Oil Company d/b/a Shell Chemical Company and Hoechst Celanese Corporation.

by their respective attorneys. The Court heard and considered evidence in support of the proposed Settlement. This evidence included live testimony, affidavits, documentary and video presentations, as well as oral representations by various attorneys. The attorneys for the parties and others were heard. An opportunity to be heard was given to all other persons requesting to be heard in accordance with the Preliminary Approval Order. This included a significant number of members of the Settlement Class who, in some instances, had traveled great distances from other states to appear and participate in the Fairness Hearing, who were invited to and did make statements and ask questions regarding the terms of the Settlement and the relief it provides.

As more fully set forth below, the Court has determined that the notice given to members of the Settlement Class certified in the Preliminary Approval Order fully and accurately informed the Settlement Class members of all material elements of the proposed Settlement; was the best notice practicable under the circumstances; was valid, due, and sufficient notice to all Settlement Class members; and complied fully with Rule 23 of the Tennessee Rules of Civil Procedure, the United States Constitution, and any other applicable law.

OPINION

The Court has greatly benefited from the fine briefs and oral arguments of the attorneys in this case, all of whom are worthy adversaries, and appreciates the manner in which they have conducted themselves in this most difficult, complex, and hotly contested litigation.

Great credit must be given to Judge Richard Silver of Monterey County, California for his initiative to coordinate a settlement conference with the *Cox* and *Spencer*[2] parties. The revised *Cox* Settlement is due, in no small part, to his efforts. The Court also commends Judge Hardaway of Greene County, Alabama, for his willingness to join in this unprecedented effort by three state courts to coordinate and settle competing national class actions. As to the settling parties, the plaintiffs, the plaintiff class, Shell Oil Co., and Hoechst Celanese Corp., the Court acknowledges that if it were not for your recognition of this opportunity to reach a global settlement of these issues, all of these efforts would have been in vain. You have put aside your armor and your hardened positions from years of battle and have finally made peace.

Compromises are favored in the law. Neither this Court, nor any court, has the resources to fully litigate all issues, nor is it always fair to the parties to do so. The time, cost, and lack of finality of protracted litigation require certain matters to be settled. The polybutylene plumbing litigation's time has come. Closure is not only appropriate, but timely. The parties to this and to the many other individual and group cases that have comprised the polybutylene plumbing litigation have fought long and hard with varying degrees of success and defeat; however, the affected party, the consumer, has seen very little benefit from these efforts. The *Cox*

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[2] *Spencer, et al. v. Shell Oil, et al.*, Case No. CV 94-074, Circuit Court of Greene County Alabama, Honorable Eddie Hardaway, Jr., presiding.

settlement agreement is a compromise. In every compromise, each side must abandon or set aside its ideal position and reach an agreement that is fair and reasonable to all concerned under the circumstances, and not insist on terms only beneficial to one party. The *Cox* settlement is not perfect. I would have preferred that the Agreement include no leak requirements and a larger claims "window" for class members. The Court has some concern the $75 million cap on past damages may not adequately pay all past damages in full; however, these concerns must be weighed in light of the numerous unique advantages to the consumer that the *Cox* settlement does provide.

The Court finds the Settlement is fair, adequate and reasonable. The $950 million dollars is a minimum contribution of the defendants to those who are affected by polybutylene plumbing. When the court initially gave preliminary approval to the proposed Settlement, this factor was the leading factor in granting that approval. As counsel for the parties have confirmed at various times in open court as the hearings have progressed in this matter, the initial funding commitment (now increased to $950 million) may ultimately be more if funds are expended and provided by the defendants and if other responsible parties contribute to the fund in the future. Due to the uncertainty of the size of the class and how many claims will ultimately be filed, this Court would not have approved a "limited fund" which provided less than full relief while demanding full release. If the worst case does present itself, that is, if the class is as large as six million people, all claims are presented, and the fund is totally expended; the only prejudice to the consumer will be the delay caused by

the filing of claims and payment of funds. The Agreement tolls statutes of limitations for class members. The Agreement provides that any consumers not fully reimbursed or compensated under the terms of the Agreement would be able to pursue all legal and equitable claims and remedies (including punitive damages) individually and as a class.

The Court finds the notice program is excellent. As specified in the findings below, the evidence supports the conclusion that the notice program is one of the most comprehensive class notice campaigns ever undertaken. The Court is satisfied that all reasonable efforts have been made to reach affected consumers.

The Court must also consider the complexity, the expense, and the likely duration of these proceedings if settlement were not reached and approved. The Court must weigh the benefits of settlement against the likely outcome of litigation. As the Court has already stated, much has been spent and much has been done over the past years in group and individual polybutylene pipe litigation across the country, but not much has been accomplished for the benefit of the consumer. The claims in *Cox* and *Spencer* each have their own legal problems, which, if fully litigated, would delay the ultimate resolution of these cases for many years to come. If litigated, complex legal issues would be presented, such as statutes of limitations and repose, choice of appropriate state laws, liability, and measure of damages. All of these issues, if litigated and appealed, could clog the courts across the country for years to come. There is a question as to whether some state courts would give full faith and credit to another state court's determination of these issues.

It is an important aspect of the Settlement that the plaintiffs' attorney's fees and costs are paid by the defendants in addition to the settlement fund, and are not deducted from the settlement fund. In the absence of a comprehensive Class Settlement now, as presented here in *Cox*, after the resolution of the contentious issues described above, any ultimate recovery available for consumers would be reduced by attorney's fees. These normally range from a third to forty percent. None of this delay, risk, mounting transaction costs and reduction of recovery by individual fees would be in the long-term interest of the consumer. In *Cox*, the attorney's fees requested are much less; approximately five percent of the settlement fund; moreover, unlike a typical contingent fee, they are not paid from the fund. The request for fees in the case is approved. The Court finds that they are reasonable under the circumstances, and the Court is pleased to approve them.

The Court is pleased with the reaction of the class members to the proposed Settlement. The Court is greatly comforted by the small number of individual opt-outs, the removal of objections by *Spencer* class counsel and by Tony Martin, who is represented by the Fleming group, and the support expressed by the consumers who testified at the Fairness Hearing. The Court finds that the Consumer Plumbing Recovery Center ("CPRC") claims facility procedures which have been outlined to the Court and which are provided for in the Agreement, appear to constitute a simple, consumer-friendly and efficient method of adjusting the claims in this case.

The discussions and negotiations that ultimately lead to the settlement presented for Court approval were, from all reports and from the Court's own observation,

intensive, exhaustive, and often heated. The Court finds the Agreement is the result of good faith, arms-length, and non-collusive negotiations. The Agreement is fair, adequate, and reasonable under the circumstances, and it is approved.

ADDITIONAL FINDINGS AND CONCLUSIONS

The entire matter of the proposed Settlement and the Application having been fully heard and duly considered by the Court, the Court further FINDS and CONCLUDES, in addition to the findings and conclusions in the foregoing Opinion, as follows:

1. The polybutylene plumbing litigation has been pending, in various forms and in various courts around the country, for more than a decade. It has included individual cases, cases with large numbers of individual plaintiffs, and putative nationwide or statewide class actions brought in federal court and in many state courts.

2. The first nationwide polybutylene plumbing class action was filed in September 1993 by lawyers who are now members of the team of *Cox* Class Counsel. The action, *Robert Beeman, et al. v. Shell Oil Company, et al.*, No. 93-047363, was filed in a state district court in Harris County, Texas.

3. Over the course of many months of intensive negotiations, involving a neutral mediator at many critical junctures, a tentative settlement of the *Beeman* case was achieved in October 1994. In February 1995, however, the Texas state court denied preliminary approval of that settlement without comment.

4. After the Court in this case certified the nationwide class on June 13, 1995, *Cox* Class Counsel joined with the plaintiffs' attorneys in the *Beeman* action to prosecute this case for the benefit of mobile and site-built homes with polybutylene plumbing across the country.

5. Collectively, this combined team of Class Counsel included highly qualified and well-regarded lawyers with extensive class action and complex litigation experience, as well as lawyers with vast experience in polybutylene plumbing litigation.

6. Class Counsel then were able to negotiate a settlement generally patterned after that originally arrived in *Beeman*, although the minimum funding commitment was $100 million greater, other features were added, and only two of the three *Beeman* defendants, Shell and Celanese, were involved.

7. Because of the pendency of a nationwide class action in Greene County, Alabama, and of other polybutylene actions around the country, with many brought as class actions, including an uncertified case for a putative statewide mobile homeowner class in the Superior Court of Monterey County, California,[3] Judge Hardaway and this Court agreed that Judge Silver in Monterey would further the cause of final resolution of polybutylene plumbing litigation if he was appointed to serve as a settlement judge for all three courts.

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[3] *Meers, et al vs. Shell Oil, et al*, Case No. M 30590, Superior Court of the State of California, County of Monterey, Honorable Richard M. Silver, presiding.

8. Judge Silver issued an October 12, 1995 *Order Setting Settlement Conference* with the endorsement of this Court and Judge Hardaway, to convene the coordinated settlement process. Other state courts with proposed class actions were asked, by the parties and/or by Judge Silver, to dismiss or stay their proceedings in deference to the coordinated settlement effort in order to give it an opportunity to succeed, undistracted by collateral litigation.

9. Accordingly, from October 23, 1995, through November 7, 1995, the day before the Fairness Hearing in this Court, intensive and continuous global settlement negotiations were conducted among *Cox* Class Counsel, the *Spencer* counsel, and defendants' counsel and representatives through the mediation and supervision of Judge Silver.

10. As a result of these concentrated efforts, a comprehensive settlement was reached, resulting in significant enhancements to the Settlement as it was originally presented to the Court and preliminarily approved on July 31, 1995.

11. The resulting Settlement, documented and as presented for final approval at the Fairness Hearing, provides consumers with a recovery program consisting of reimbursement of otherwise unreimbursed expenses for repairs to and replacement of leaking polybutylene plumbing systems and property damage caused by such leaks, as well as an extensive program for replacement of such leaking plumbing systems.

12. Some of the features of this Settlement are these:

a. Free replacement of polybutylene plumbing systems installed since January 1, 1978, if two or more qualifying leaks occurred before August 21, 1995, or if only one such leak occurs either in the two years following that date or during a period (of from 10 to 16 years, depending on the type of structure) following installation of the system;

b. Reimbursement of the unreimbursed expenses of plumbing repairs, replacements, and property damage from January 1, 1978, to August 21, 1995, up to $75 million will be distributed, *pro rata* if necessary, for these expenses; and property damage after August 21, 1995, at 100 cents on the dollar;

c. An unlimited funding potential, with the defendants committed to to [sic] initially provide up to $950 million for the relief; if additional funds are required, the defendants will either provide them, or litigation will be resumed with all applicable statutes of limitations and repose tolled in the interim;

d. Provision for additional relief to eligible members of the Settlement Class who experience special needs in connection with qualifying leaks;

e. A comprehensive notice program, including notice every three years through the life of the program, which ends in 2009; and

f. The payment of class counsel's attorneys' fees and expenses in addition to the $950 million reserved for relief for the Settlement Class.

13. The Court is not aware of any other class action settlement with successive notice as provided in the *Cox* Settlement.

14. In reaching this Settlement, the defendants have foregone very significant defenses and issues which could have precluded or limited liability as to some or many class members' claims. These include the statutes of limitations and repose, selection of the appropriate states' laws applicable to various issues, the "economic loss" limitation on recoveries of the type sought here, the lack of privity between the members of the Settlement Class and the defendants, the fact that many of the members of the Settlement Class purchased their structures "as is," and, of course, the risk that plaintiffs would not be successful in proving their allegations. In agreeing to this Settlement, the defendants have displayed commendable corporate responsibility, responsiveness, and good will toward consumers.

15. The Court appointed Rust Consulting, Inc. and Kinsella Communications Ltd. as class notice providers in this case. Richard Redfern, president of Rust Consulting, and Katherine Kinsella, president of the communications firm bearing her name, testified at the Fairness Hearing. The Court also considered Ms. Kinsella's affidavit and the affidavit of Jeffrey Dahl, Executive Vice President of Rust Consulting, in connection with their activities as notice providers.

16. *Cox* Class Counsel and the notice providers worked with Todd B. Hilsee, an experienced class action notice consultant, to design a class notice program of unprecedented reach, scope, and effectiveness. Mr. Hilsee was accepted by the Court as a qualified class notice expert at an earlier hearing to approve the commencement of the notice program. He testified at the Fairness Hearing, and his affidavit was also considered

by the Court, as to the operation and outcome of this program.

17. The above-mentioned individuals provided documents, information, and affidavits at the outset of the notice period that assisted the parties in designing, and the court preliminarily approving for implementation, a singularly comprehensive and creative notice program.

18. Beginning in August, 1995, and extending into October, 1995, an extensive notice effort was undertaken in this case to implement the Court approved notice program specified in the Preliminary Approval Order.

19. Since not all Settlement Class members were known or readily identifiable, the notice program implemented in this case combined multimedia publication (newspapers, magazines, radio and television), individual mailed notice, ongoing press and media outreach, and a toll-free telephone information service. The purpose of the program was to make potential Settlement Class members aware of the Action and the Settlement, and to encourage them to identify themselves to the notice providers, as they could receive further written notices and information, and be placed on the notice providers' Settlement Class member database.

20. Commencing on or before August 21, 1995, which is the Initial Notice Date as specified in the Agreement, more than 5.6 million copies of the Court approved Notice of Class Action and Proposed Settlement were mailed, by first class mail or overnight service, to Settlement Class members in accordance with the Preliminary Approval Order.

21. During September, 1995, the Court approved summary notice was published in *Parade* Magazine, *USA Weekend*, *People* Magazine, and *TV Guide* in accordance with the Preliminary Approval Order. The combined circulation of these consumer publications and national magazines is over 73 million. During August and September, 1995, Court approved notice appeared twice in Friday editions of *USA Today*, with combined circulation of over 4.7 million.

22. Also during September, 1995, the Court approved summary notice appeared in 201 daily and weekly newspapers in 13 targeted states (Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Maryland, Nevada, North Carolina, South Carolina, Texas, and Virginia) and the District of Columbia. The combined circulation of these newspapers exceeds 23.6 million. In addition, the notice appeared in Spanish in 38 Hispanic newspapers, with a combined circulation over 3 million, in 29 media markets during September, 1995. Moreover, the notice appeared in 247 daily, weekly, bi-monthly, and monthly African-American newspapers with a combined circulation of nearly 6 million.

23. Notices were also published in the October, 1995, editions of various trade publications, comprising a total circulation of 244,000.

24. A 30-second spot television notice was produced and appeared 213 times from August 21, 1995, through September 3, 1995, on national and cable television, including on such networks as ABC, NBC, CBS, TNN, CNN, and TNT. During the same period, a 30-second Spanish language television notice appeared

18 times on the Univision Network, a popular Spanish language network.

25. A press release, a media advisory, a public service announcement, a video news release, a radio news release, and a press kit were all prepared and disseminated as part of the notice program in this case. The press release went to 2,000 newspapers, wire services, magazines, and broadcast points across the United States through PR Newswire. The press release and media advisory were also disseminated to 469 media outlets, specifically targeting consumer reporters and media in the top 250 media markets and 84 local daily newspapers in the 13 targeted states and the District of Columbia. 142 outlets, with a combined circulation of more than 14.5 million, have confirmed using the press materials to publish articles. It is estimated that the public service announcement was broadcast by radio stations yielding nearly 2.9 million gross impressions; an additional 5.5 million impressions are estimated from the broadcast of the radio news release. The video news release was used by at least 21 outlets with combined viewership of more than 1.7 million. Finally, a two-column article was provided to 10,000 daily and weekly newspapers.

26. Court approved notice forms were disseminated through various online computer services, including CompuServe, Prodigy, and America Online, and with Legal Link on the Internet.

27. The various forms of published notice provided recipients with a toll free "800" telephone number to which potential Settlement Class members could call to obtain further information and to request the full notice

packet to be mailed to them. The telephone message was updated as the notice program progressed, and commonly raised questions were answered by live operators, in English or Spanish as required by the caller. The parties prepared and updated scripts and information by which the operators were able to provide the general information commonly requested by callers.

28. The toll-free telephone facility established for notice purposes in this case received more than one million telephone calls in response to the published notice program.

29. Over 195,000 requests for a claim form have been received by the notice providers.

30. Mr. Hilsee demonstrated, by affidavit and in live testimony at the Fairness Hearing, a number of significant facts regarding the reach and effectiveness of the notice. The national media campaign reached an extraordinarily high percentage of United States adults aged 35 years and over: approximately 114 million individuals, or 92.11% of this population. Each of these adults was exposed to the national media notice an average of 4.01 times. The national media campaign also reached approximately 151 million persons in the United States aged 25 years and over, representing 90.88% of this population. Each of the individuals in this larger, secondary target group was reached an average of 3.76 times by the national media notice, a frequency that also exceed [sic] the primary target reach in other class actions. These are higher reach and frequency statistics than have been found adequate by courts in other class actions. These data do not include the reach of the notice campaign through means other

than the national paid notice campaign, such as the television and print notices targeted to Hispanic and African-American media, the local newspaper notices, the non-paid media and direct mail notices to millions of Settlement Class members.

31. Multifaceted notice programs like that implemented in this case have been approved by other courts and utilized successfully for similar purposes in large consumer or product class actions such as this one, where most class members are not individually identified at the outset. *See, e.g., In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 534 (E.D. Pa. 1992); 148 F.R.D. 297 (E.D. Pa. 1992); *In re Silicone Gel Breast Implant Products Liability Litigation*, MDL 926 (N.D. Ala. 1994); *Roberts v. Bausch & Lomb, Inc.*, 94-C-1144-W (N.D. Ala. 1995).

32. As other courts have done with respect to the less comprehensive notice programs they approved, this Court finds that the notice program described above, as designed and implemented, met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and its progeny.

33. Thus, the best notice practicable under the circumstances has been provided to members of the Settlement Class. That notice accurately and adequately advised them of this action; the proposed Settlement and its terms, features, and benefits; their rights and options; and the applicable procedures and deadlines for exercising them.

34. A full opportunity has been provided to the members of the Settlement Class to participate in the Fairness Hearing, both orally and by way of written submission to the Court.

35. The Court previously found the requirements of Rule 23 of the Tennessee Rules of Civil Procedure were met and certified a nationwide class for litigation and trial purposes in the Order of National Class Certification. While such certification was and is contested by the defendants, they have agreed to class certification for settlement purposes, to promote a comprehensive, classwide resolution of polybutylene pipe litigation.

36. The numerosity, typicality, commonality, and adequacy requirements of Rule 23.01 of the Tennessee Rules of Civil Procedure are satisfied as to the Settlement Class in connection with the Settlement in this case.

37. In accordance with Rule 23.02(3), common issues of fact and law predominate and make certification of the Settlement Class for settlement purposes efficient and appropriate. The members of the Settlement Class have been afforded the right and opportunity to exclude themselves from the Settlement Class.

38. The settlement encompassed within the Agreement is in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class.

39 The Court-approved notice program provided clear and simple procedures and instructions for the submission of objections by or on behalf of Settlement Class members. For example, paragraph 10 of the Court-approved *Notice of Class Action and Proposed*

Settlement required objections to be submitted, in writing, postmarked not later than October 20, 1995, and further stated, "if you do not comply with the procedure and the deadline stated herein, you may not be entitled to be heard at the Fairness Hearing or to otherwise contest the approval of the Settlement, or to appeal from any orders or judgments of the Court entered thereon." All objections, however styled, that failed to comply with the procedures and deadlines set forth in the notice program, are hereby found to be procedurally deficient and are disqualified in accordance with the foregoing statement.

40. The Court has also reviewed the Principles of Agreement dated November 7, 1995, executed by the parties, including the terms applicable to U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The terms of the Principles of Agreement appear to be reasonable and in accordance with the efforts being made to seek a global resolution of all litigation pertaining to the issues among the parties. The prior *Cox* settlement was unclear as to the effect of funds received from U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The revised settlement makes clear that amounts received from U.S. Brass and/or Eljers will add to the minimum fund of $950 million. If that settlement is perfected and approved by the United States Bankruptcy Court, the minimum fund would substantially increase.

41. In independently determining to approve the Settlement and the Application, the Court has considered the substance of all objections to the Settlement, whether timely, qualified or not, including those by the

Martin Objectors and others that have since been withdrawn or stricken.

42. Certain objectors have asserted that the proposed Settlement must be reduced by a proposed settlement of claims against du Pont in the *Spencer* case pending in the Circuit Court of Greene County, Alabama, which the objectors characterized as a $120 million settlement.

43. The proposed du Pont settlement has not been approved by the *Spencer* court, and this Court may not speculate whether it will be approved by the *Spencer* court.

44. The proposed du Pont settlement in *Spencer* purports to entitle a claimant to a rebate of 8% of monies the claimant pays for replumbing his or her structure.

45. The Settlement before this Court, in the minimum amount of $950 million, provides for the assignment of Settlement Class members' claims against du Pont and others to defendants Shell and Celanese.

46. Objectors are incorrect in asserting that the "credit" arising from the assignment reduces the Defendants' contribution to the Settlement. The original *Cox* settlement was $850 million to be paid by the Defendants. The revised *Cox* settlement requires the Defendants to pay a minimum of $950 million to consumers with assignment of rights, against du Pont, regardless of whether du Pont ultimately participates in the settlement. The revised *Cox* settlement substantially increases benefits to consumers.

47. Contrary to objectors' assertions, all interest earned on funds held by the CPRC will be for the benefit of

the Settlement Class and will not be credited against the Defendants' obligations under the Agreement.

48. Because of the structure of the Settlement, the Defendants' obligation to fund the CPRC on an ongoing, as-needed basis, and the Defendants' obligation to pay reimbursement for Past Expenses in a reasonable time after the close of the one year claim filing period on August 21, 1996, and any related opt out period that may be necessary under § 4.5.1 of the Agreement, there is no significant ability by the Defendants to delay payments due under the Settlement.

49. Objectors are incorrect in asserting that, even before the Defendants' initial funding commitment was increased from $850 million to $950 million, the "net funding by Shell and Celanese under . . . the agreement [was] only $547 million."

50. The notice provided to the Settlement Class was neither misleading nor defective.

51. The defendants are each responsible for one-half of the settlement obligations as specified in the Settlement Agreement unless and until the respective liabilities are established by arbitration under the Funding Agreement.

52. The *Cox* Class Counsel have undertaken a reasonable risk that each of the defendant companies will be solvent and capable of fulfilling its obligations under this agreement.

53. Had the plaintiffs settled at separate times with Shell and Celanese, it is highly unlikely that there would ever have been joint and several liability between them.

54. The Settlement is more favorable to the Settlement Class than litigation if it is assumed that one of the defendants will, some years from now, become unable to pay all claims, since the class will receive payment under the Settlement promptly, thereby reducing the number of claimants who would be subjected to proving claims in a bankruptcy.

55. The Agreement provides broad ranging powers for the enforcement of a defaulting defendant's obligations, including the full panoply of equitable powers this Court possesses.

56. The Agreement expressly provides that the default of one defendant does not exonerate the other defendant of its obligations under the Agreement.

57. Past expenses will be compensated after expiration of one year from August 21, 1995, the Initial Notice Date under the Agreement.

58. Claimants will not, contrary to an objection, be required to wait 14 years to receive their entitled reimbursements or distributions under the Agreement.

59. The so-called exclusion of a "hot water heater leak" – a leak occurring within six feet of piping measured from the take-off at the unit's hot water heater – does not apply to any claim for reimbursement of repair costs and property damage. Thus, the only exclusion is for eligibility for a replumb, and even there, the exclusion applies only if (1) it is the first leak in the unit *and* (2) it can be repaired without cutting into the unit's walls, ceilings, or floors.

60. Therefore, a replumb will be provided under the Agreement even if the hot water heater leak is the first leak, if to repair the leak would require cutting into the

walls, ceilings, or floors of the unit. Similarly, there will be a replumb if the hot water heater leak is the second leak in the system.

61. The claimant has the right to select the contractor to do the replumbing and property damage repair work.

62. Nothing in the Agreement abrogates the warranty of work done by the contractors and suppliers of pipe and other components in the replumb.

63. The Agreement permits special relief involving unusual hardship, so long as the CPRC Ombudsman and President concur that such relief should be provided. This provision allows the CPRC to provide relief from a breach of warranty arising out of replumbing work, where the warrantor fails to provide or cannot provide corrective relief. CPRC § VI, E.

64. There is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel.

65. The *Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case.

66. There is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* Settlement.

67. There is no need to provide additional notice to the entire Settlement Class by reason of the revised terms of the Settlement since the Court approved the notices disseminated to the Settlement Class. All changes have

been to improve the Settlement over that described in the notices, and none of the changes has an adverse impact on any Class member.

68. As class action jurisprudence has accumulated, various federal and state courts, in Tennessee and elsewhere, have articulated criteria and factors that courts may consider in evaluating proposed settlements for final approval. *See, e.g., Third Nat'l Bank v. Scribner*, 212 Tenn. 400, 410, 370 S.W.2d 482 (1963); *Clark Equip. Co. v. International Union, Allied Indus. Workers*, 803 F.2d 878, 880 (6th Cir. 1986), *cert. denied sub nom. Jones v. Clark Equip. Co.*, 480 U.S. 934 (1987); *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983); *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). This Court has been guided, generally, by the procedures and criteria recommended in the *Manual for Complex Litigation*, 3d ed. (Federal Judicial Center 1995), §§ 30.4 *et seq.*, since the federal and Tennessee class action provisions and criteria are consistent.

69. Factors that may be considered in assessing the fairness, adequacy, and reasonableness of the proposed settlement include: the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; the stage of the proceedings at which the settlement is reached; the extent of cumulative discovery or investigation; the nature of the settlement negotiations; the costs, risks, and delays of establishing liability and damages; the views of experienced counsel; the reaction of the class members themselves; the comparison of the settlement's benefits with

other settlements or with the alternative of continuing litigation; and whether approval of the settlement is in the class members' and the public interest. As the above opinion and findings demonstrate, consideration of these and other recognized factors, such as the participation and recommendations of an experienced and able settlement judge and the testing of the settlement's merits in the class of adversary proceedings, demonstrate the Settlement's entitlement to approval.

70. Expert opinions have been submitted in support of the proposed Settlement. (*See* Opinion of Professor David Rosenberg, Affidavit of Professor Paul H. Rubin). In approving the Settlement, the Court has considered these opinions.

71. The Court will retain jurisdiction and address a supplemental notice program, on a joint motion of the settling parties, to advise all members of the Settlement Class on whose behalf a purported or actual request for exclusion was received of the enhanced Settlement, providing those individuals with a new opportunity to request exclusion from the Settlement Class in light of the enhanced Settlement.

72. There is no just reason for delay in the entry of a final judgment and decree by reason of such supplemental notice and related proceedings or of the retention by the Court of continuing jurisdiction to oversee the implementation and enforcement of the Agreement and Settlement.

73. The Application is fair and should be granted.

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The Court has jurisdiction over all claims asserted in the Action on behalf of all Settlement Class members and over all parties to the Action, including all members of the Settlement Class.

2. The Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The definition of the Settlement Class excludes:

> (1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in

and for the County of San Diego, and all members of the certified classes in those lawsuits.

3. All members of the Settlement Class who have not timely elected to be excluded from the Settlement Class are members thereof and are bound by this Order and the Final Judgment being entered herewith.

4. Pursuant to Rule 23.01, Rule 23.02, and Rule 23.03 of the Tennessee Rules of Civil Procedure, the Court confirms the certification of the Settlement Class provided in the Preliminary Approval Order and maintains such certification for purposes of final approval of the settlement.

5. The Class Representatives and Plaintiffs' Class Counsel designated in paragraph 8 of the Court-approved *Notice of Class Action and Proposed Settlement* to represent the Settlement Class are hereby confirmed.

6. The Agreement and the Funding Agreement entered into by the Defendants pursuant to the Agreement are hereby made part of the record in this case and as such shall have the full force and effect of an order of the Court.

7. Pursuant to Rule 23.05 of the Tennessee Rules of Civil Procedure, the Court hereby grants final approval of the Agreement and the Settlement set forth in the Agreement and finds that it is fair, adequate, and reasonable to the members of the Settlement Class.

8. The objections that were filed, whether timely or not, have been considered and are all overruled.

9. Accordingly, the Court directs that the Settlement be consummated in accordance with the terms and conditions of the Agreement.

10. Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

11. The Complaint as amended, and all claims and causes of action asserted therein are dismissed with prejudice and costs, as provided in the Agreement, to be paid from the settlement fund.

12. The Application is hereby granted. In accordance with the Funding Agreement referred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid. In addition, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

13. In the event that the Settlement does not become Final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Order

and the Final Judgment and Decree being entered herewith shall be rendered null and void and be vacated and the Agreement shall be rendered null and void in accordance with the provisions thereof.

14. Without affecting the finality of this Order or of the Final Judgment being entered herewith, the Court shall retain continuing jurisdiction over the Action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the Settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Agreement.

15. Any disputes or controversies arising with respect to the interpretation, enforcement, or implementation of the Agreement shall be presented by motion to the Court.

16. Pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, the Court hereby directs the entry of this judgment based upon the Court's finding that there is no just reason for delay notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement and its continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

/s/ W. Maloan
CHANCELLOR

ENTERED: November 17, 1995

IN THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated, Plaintiffs, v. SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION, Defendants.	Civil Action No. 18,844 CLASS ACTION OBION COUNTY

FINAL JUDGMENT

(Filed Nov. 17, 1995)

This matter is before the Court on motion by the parties for final approval of their proposed settlement as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application").

A hearing on the motion and Application was held on November 8 and 9, 1995, pursuant to the Court's Order of

July 31, 1995, granting preliminary approval of the settlement and the August 7, 1995, order conforming the class definition, under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-outs and Objection Dates.

This Final Judgment is entered pursuant to a Final Order Approving the Class Action Settlement, Attorneys' Fees and Expenses, and Awards to Representative Plaintiffs (the "Final Order") which is entered together herewith. The Court has determined that the Class Action Settlement, as encompassed within the Agreement, should be approved as fair, adequate, and reasonable to the Settlement Class under Rule 23.05 of the Tennessee Rules of Civil Procedure, and that the Application should be granted.

The Court has further determined that there is no just reason for delay in the entry of final judgment in accordance with the Final Order pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.

Accordingly, it is ORDERED that judgment is hereby entered in accordance with the Final Order.

It is further ORDERED that the Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of

leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The definition of the Settlement Class excludes:

(1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

It is further ORDERED that the Court directs that the settlement be consummated in accordance with the terms and conditions of the Agreement.

It is further ORDERED that the Amended Complaint and all claims and causes of action asserted therein are dismissed with prejudice with costs to be paid from the settlement fund in accordance with the terms of the Settlement Agreement.

It is further ORDERED that, in the event that the settlement does not become final (as more fully defined in

the Agreement) in accordance with the terms of the Agreement, then this Final Judgment and the Final Order shall be rendered null and void and be vacated, and the Agreement shall be rendered null and void in accordance with the provisions thereof.

It is further ORDERED that, without affecting the finality of the Final Order and this Final Judgment, the Court shall retain continuing jurisdiction over this action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Settlement Agreement.

It is further ORDERED that, subject and pursuant to the terms and conditions of the Agreement, Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

It is further ORDERED that, in accordance with the above-described Application and the Funding Agreement

referred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million, plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid.

It is further ORDERED that, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

It is further ORDERED, pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, that the Court hereby DIRECTS the entry of this judgment as a final judgment based upon the Court's finding that there is no just reason for delay, notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement as set forth above, and the Court's continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

Dated at Union City, Tennessee, this 17 day of November, 1995.

/s/ W. Michael Maloan
W. MICHAEL MALOAN,
CHANCELLOR